# MBf Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11–26 OF 2001
LOW HOP BING J
21 JANUARY 2003

***Contract*** *— Construction of terms of contract — Contra proferentum rule — Whether there was any doubt or ambiguity in agreement*

***Evidence*** *— Burden of proof — Person who alleged fact had to prove it — Whether plaintiff had burden to show that the maximum permissible laden weight of the lorry exceeded 2540kg — Whether burden of proof discharged by plaintiff — Evidence Act 1950 ss 101, 102, illustration (b)*

***Hire Purchase*** *— Breach of agreement — Action to recover unpaid instalments — Whether item was within the First Schedule of the Hire Purchase Act 1967 — Whether parties intended to contract within the Hire Purchase Act 1967 — Whether the Hire Purchase Act 1967 applied — Hire Purchase Act ss 4C, (c)(iii)–(v), 16(6), First Schedule, Fifth Schedule, Part II*

This is an appeal by the appellant plaintiff ('the plaintiff') against the decision of the learned magistrate who had dismissed the plaintiff's amended claim for the balance sum of RM24,397.81 with costs. The first defendant executed a hire purchase agreement wherein the plaintiff agreed to finance the first defendant in enabling the first defendant to purchase a unit of ISUZU NHR 55E (SV). The first defendant paid the sum of money upon execution and the balance thereof was to be paid in instalments. The second defendant executed a guarantee to guarantee the instalment payments by the first defendant. Evidence was adduced for the plaintiff, through SP1, a credit officer for the plaintiff, that the vehicle was a heavy vehicle which was not subject to the Hire Purchase Act 1967 ('the Act'). The first defendant defaulted in effecting payments from June to September 1997 and this resulted in the plaintiff bringing an action against the defendants. The defendants elected not to give any evidence, but submitted that the plaintiff had not proved its case against them on the sole ground that the agreement was subject to the Act as the vehicle was prescribed in the First Sch to the Act, and thus the plaintiff had to comply with the mandatory provisions in s 16(6) of the Act pertaining to the service of the notice in the Fifth Sch thereto. This was upheld by the learned magistrate. The defendants also submitted that, inter alia, the parties clearly intended the agreement to be subject to the Act as the intitulement, formation and contents were in conformity with the requirements of Pt II of the Act and even if the item was not within the First Sch, this did not prevent the parties from contracting within the Act and that the doctrine of contra proferentum applied in favour of the defendants. The plaintiff's counsel submitted that the learned magistrate had erred in holding

that the burden of proving the maximum permissible laden weight of the lorry exceeded 2540kg was on the plaintiff and in concluding that the plaintiff failed to discharge this burden. A

**Held**, allowing the appeal, setting aside the order of the learned magistrate and giving judgment in favour of the plaintiff in terms as prayed in the amended claim, with costs: B

(1) Section 4C of the Act prescribes the contents of a hire purchase agreement under the Act, but a proper perusal of the agreement tendered before the learned magistrate showed that the agreement did not follow the contents of s 4C(c)(iii)–(v) as these items pertaining to the amounts included in the freights, vehicle registration fees and insurance were not specified in the agreement. In the circumstances, it was clear that the parties hereto have agreed not to be bound by the provisions of the Act (see p 310D–E). C

(2) The phrase 'burden of proof' has two distinct meanings, namely, the legal burden of establishing a case and the evidential burden of introducing evidence. Section 101 of the Evidence Act 1950 deals with the former while s 102 of the same Act deals with the latter (*Evidence: Practice And Procedure* (2nd Ed, 2000) by Augustine Paul J) (see p 311E–F). D E

(3) Applying ss 101 and 102 of the Evidence Act 1950, the legal burden of proof was on the plaintiff to establish that the lorry was not subject to the Act. The plaintiff sought to do this by adducing evidence that it was a lorry and a heavy vehicle and that it was not subject to the Act. There was therefore prima facie evidence that the lorry was a heavy vehicle not subject to the Act, but the defendants' counsel made no attempt whatsoever to cross-examine, although it had been pleaded by the defendants that the lorry and the agreement were subject to the Act. The legal burden of proof on the plaintiff under s 101 had prima facie been discharged on a balance of probabilities and the evidential burden shifted to the defendants (see p 311G–H). F G

(4) The defendants could have discharged the evidential burden by cross-examination of witnesses of the plaintiff or by calling witnesses or by giving evidence themselves or by a combination of the different methods. In view of the fact that the defendants did not cross-examine SP1 on the evidence that the lorry as a heavy vehicle was not subject to the Act, and elected not to call witnesses or give evidence themselves, the defendants could not be heard to raise this issue in argument (see p 312A–C); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 followed. Further, illustration (b) in s 102 of the Evidence Act 1950 clearly casts the evidential burden of proof on the defendants and the plaintiff's case remained unrebutted as the H I

A defendants had failed to discharge the evidential burden of proof (see pp 312F, 313D).

(5) The court was unable to identify the part of the agreement which had suffered from an ambiguity or a doubt. One must not attribute an ambiguity or doubt to an agreement when in reality there was none. The court did not find any force or merit in the submission that the doctrine of contra proferentum applied and saw no reason in upholding it (see p 313H).

**[Bahasa Malaysia summary**

Ini merupakan rayuan oleh perayu plaintif ('plaintif') terhadap keputusan majistret yang arif yang telah menolak tuntutan terpinda plaintif untuk baki jumlah sebanyak RM24,397.81 dengan kos. Defendan pertama telah melaksanakan perjanjian sewa beli di mana plaintif telah bersetuju membiayai defendan pertama untuk membolehkan defendan pertama membeli seunit ISUZU NHR 55E (SV). Defendan pertama telah membayar sejumlah wang setelah perlaksanaan perjanjian tersebut dan bakinya akan dijelaskan melalui ansuran. Defendan kedua telah melaksanakan satu jaminan untuk menjamin pembayaran ansuran tersebut oleh defendan pertama. Keterangan telah diberi untuk pihak plaintif, melalui SP1, seorang pegawai kredit untuk plaintif, bahawa kenderaan tersebut merupakan kenderaan berat yang tidak tertakluk kepada Akta Sewa Beli 1967 ('Akta tersebut'). Defendan pertama gagal membuat bayaran daripada Jun sehingga September 1997 dan plaintif telah memulakan tuntutan terhadap defendan-defendan. Defendan-defendan telah memilih supaya tidak memberi keterangan, tetapi telah berhujah bahawa plaintif tidak membuktikan kes mereka terhadap defendan-defendan kerana perjanjian tersebut tertakluk kepada Akta tersebut memandangkan kenderaan tersebut ditetapkan di dalam Jadual Pertama kepada Akta tersebut, dan oleh itu, plaintif mesti mematuhi peruntukan mandatori dalam s 16(6) Akta tersebut mengenai penyampaian notis tersebut di dalam Jadual Kelima. Ini telah disahkan oleh majistret yang arif. Defendan-defendan telah berhujah bahawa, inter alia, parti-parti dengan jelasnya berniat supaya perjanjian tersebut tertakluk kepada Akta tersebut oleh kerana tajuk, bentuk dan isi perjanjian menurut peruntukan Bahagian II Akta tersebut, dan walaupun barang tersebut tidak dalam Jadual Pertama, ini tidak menghalang parti-parti daripada membuat perjanjian di dalam Akta tersebut dan doktrin contra proferentum terpakai kepada defendan-defendan. Peguam plaintif berhujah bahawa majistret yang arif telah khilaf dalam memutuskan bahawa beban membuktikan had maksimum sarat berat lori tersebut melebihi 2540kg adalah pada plaintif dan dengan memutuskan bahawa plaintif telah gagal melepaskan beban tersebut.

**Diputuskan**, membenarkan rayuan tersebut, mengenepikan perintah majistret yang arif dan memutuskan untuk plaintif seperti yang

dipohon di dalam tuntutan yang dipinda, dengan kos di sini dan di mahkamah di bawah: A

(1) Seksyen 4C Akta tersebut menentukan isi perjanjian sewa beli di bawah Akta tersebut, tetapi penelitian betul perjanjian tersebut yang dikemukakan di hadapan majistret yang arif ini telah menunjukkan bahawa perjanjian tersebut tidak mengikut B s 4C(c)(iii)–(v) kerana butir-butir yang berkenaan jumlah yang termasuk dalam pengangkutan, bayaran pendaftaran kenderaan dan insurans tidak ditetapkan di dalam perjanjian tersebut. Di dalam keadaan tersebut, adalah jelas bahawa parti-parti bersetuju supaya tidak terikat oleh peruntukan-peruntukan Akta tersebut (lihat ms 310D–E). C

(2) Frasa 'burden of proof' mempunyai dua tafsiran, iaitu, beban di sisi undang-undang untuk membuktikan kes dan beban keterangan untuk mengemukakan keterangan. Seksyen 101 Akta Keterangan 1950 adalah berkenaan beban di sisi undang-undang dan s 102 Akta yang sama adalah mengenai beban keterangan D (*Evidence: Practice And Procedure* (2nd Ed, 2000) oleh Augustine Paul H) (lihat ms 311E–F).

(3) Memakai ss 101 dan 102 Akta Keterangan, beban pembuktian di sisi undang-undang adalah pada plaintif untuk membuktikan bahawa lori tersebut tidak tertakluk kepada Akta tersebut. Plaintif E cuba melakukan ini dengan mengemukakan keterangan bahawa ia adalah sebuah lori dan kenderaan yang berat dan ia tidak tertakluk kepada Akta tersebut. Oleh itu, terdapat keterangan prima facie bahawa lori tersebut merupakan kenderaan berat yang tidak tertakluk kepada Akta tersebut, tetapi peguam defendan-defendan tidak membuat sebarang percubaan untuk menyoal F balas, walaupun telah diplidkan oleh defendan-defendan bahawa lori tersebut dan perjanjian tersebut tertakluk kepada Akta tersebut. Beban pembuktian di sisi undang-undang pada plaintif di bawah s 101 prima facie telah dilepaskan pada imbangan kebarangkalian di dalam kes sivil ini di mana beban keterangan mengalih kepada parti yang lain, iaitu defendan-defendan (lihat G ms 311G–H).

(4) Defendan-defendan boleh melepaskan beban keterangan dengan menyoal balas saksi-saksi plaintif atau dengan memanggil saksi-saksi atau dengan memberi keterangan dengan sendirinya atau melalui gabungan cara-cara tersebut. Memandangkan bahawa H defendan-defendan tidak menyoal balas SP1 di atas keterangan bahawa lori sebagai kenderaan berat tidak tertakluk kepada Akta tersebut, dan memilih supaya tidak memanggil saksi-saksi atau memberi keterangan sendiri, defendan-defendan tidak boleh membangkitkan isu ini dalam hujah (lihat ms 312A–C); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 diikut. Lagipun, illustrasi (b) dalam I s 102 Akta Keterangan 1950 jelas meletakkan beban pembuktian

keterangan pada defendan-defendan dan kes plaintif tidak dipatahkan kerana defendan-defendan gagal melepaskan beban pembuktian keterangan (lihat ms 312F, 313D).

(5) Mahkamah tidak dapat mengenal pasti bahagian perjanjian yang mempunyai ketaksaan atau keraguan. Seseorang tidak boleh menganggap bahawa suatu perjanjian mempunyai ketaksaan atau keraguan di mana ia tidak mempunyai ketaksaan atau keraguan. Mahkamah tidak dapat mencari kuasa atau merit di dalam hujah bahawa doktrin contra proferentum terpakai dan tidak dapat mensahkannya (lihat ms 313H).

**Notes**

For cases on the contra proferentum rule, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 2363–2365.

For cases on person who alleged fact had to prove it, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 476–477.

For cases on action to recover unpaid instalments, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3402–3403.

**Cases referred to**

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (folld)

*Arab Malaysian Credit Bhd v Har Yoke Ling* [1998] MLJU 2 (refd)

*Browne v Dunn* (1893) 6 R 67 (refd)

*Edis v Bury* 108 ER 511 (refd)

*International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (refd)

*Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (refd)

*Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 (refd)

*Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor* [1990] 1 MLJ 291 (distd)

*MBf Finance Bhd v Alluwi bin Salleh & Anor* [2002] 1 MLJ 497 (cited)

*Sivalingam Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (refd)

*TA Securities Sdn Bhd v Lim Tee Keong* [2001] MLJU 481 (refd)

*Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 (refd)

*Tiun Eng Jin v Wong Sie Kong* [1975] 2 MLJ 34 (refd)

*UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 (refd)

*Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 (refd)

**Legislation referred to**

Evidence Act 1950 ss 101, 102

Hire Purchase Act 1967 ss 1(2), 2(1), 4C, (c)(iii)–(v), 16(6), First Sch, para 2(d), Fourth Sch, Fifth Sch

**Appeal from:** Summons No 72–1336 of 1999 (Magistrate's Court, Melaka)

*Leong Ting Ting* (*Tunku Amiruddin & KK Chew*) for the plaintiff. A
*Michael Tan Lip Yip* (*Lee & Yong*) for the defendants.

**Low Hop Bing J**:

APPEAL B

This is an appeal by the appellant plaintiff ('the plaintiff') against the decision of the learned magistrate who had on 8 June 2001 dismissed the plaintiff's amended claim for the balance sum of RM24,397.81 with costs.

AGREED FACTS C

At the hearing before the learned magistrate, certain facts were agreed by the parties. It was agreed that the plaintiff is a licensed finance company having its registered office in Kuala Lumpur. One of its branches is in Melaka, with which the first defendant had executed a hire purchase agreement No 2–0401–74 1297–4D dated 13 January 1997 ('the D agreement') wherein the plaintiff has agreed to finance the defendant in enabling the first defendant to hire and purchase a unit of ISUZU NHR 55E (SV) bearing registration number MAJ 682, engine number 310044 and chassis number JAANHR 55EP 7112329. The first defendant paid a sum of RM9,820.76 upon execution of the agreement towards the account of the purchase consideration of RM82,240.76 and the balance thereof was E to be paid with effect from 15 February 1997 by way of 71 instalments at RM1,006 per month and a final instalment of RM994. The second defendant executed a guarantee on the same date to guarantee the aforesaid instalment payments by the first defendant.

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EVIDENCE BEFORE THE LEARNED MAGISTRATE

In addition to the aforesaid agreed facts, evidence was adduced for the plaintiff through SP1, ie one Zulkifli bin Atan, a credit officer of the plaintiff since 4 May 1979. He had knowledge of the transaction between the plaintiff and the defendants. SP1 testified that the vehicle is a heavy vehicle which is not subject to the Hire Purchase Act 1967 ('the Act'). After G effecting payment of four instalments from February until May 1997, the first defendant defaulted from June until September 1997 which resulted in the plaintiff bringing the action against the defendants in the court below for the balance sum of RM24,397.81, after deducting all previous payments and the proceeds of sale realized after repossession thereof by the H plaintiff.

The defendants elected not to give evidence but instead submitted that the plaintiff has failed to prove its case against the defendants on the sole ground that the agreement is subject to the Act as the vehicle is a motor lorry prescribed in the First Sch to the Act, in which case it was argued for the defendants that the plaintiff must comply with the mandatory provisions I of s 16(6) of the Act pertaining to the service of the notice in the Fifth Sch thereto.

A The defendants' submission on this ground was upheld by the learned magistrate who held that the plaintiff's evidence that the lorry was a heavy vehicle was not sufficient in the absence of evidence in support thereof.

SUBMISSION FOR PLAINTIFF

B Miss Leong Ting Ting, learned counsel for the plaintiff, by way of written submission stressed in essence that the learned magistrate erred in holding that the burden of proving that the maximum permissible laden weight of the lorry exceeds 2540kg is on the plaintiff and also erred in concluding that the plaintiff has failed to discharge this burden.

C

CONTENTION FOR DEFENDANTS

Learned counsel, the late Mr Michael Tan Lip Yip, assisted by Mr Yong Chen Lim, in their written submission filed prior thereto, contended for the defendants that the learned magistrate did not occasion any error of law or D fact in dismissing the plaintiff's claim, adding that the parties are bound by their pleadings. It was stressed for the defendants that the parties have clearly intended the agreement to be subject to the Act as 'the intitulement, formation and contents of the agreement were in conformity with all the requirements of Pt II of the Act', citing *MBf Finance Bhd v Alluwi bin Salleh & Anor* [2002] 1 MLJ 497 in support thereof.

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The defendants' learned counsel also relied on *Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor* [1990] 1 MLJ 291 in submitting that even if the item in the agreement, ie Isuzu lorry, is not specifically within the First Sch to the agreement, it does not prevent the parties from contracting within the Act.

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It was finally argued for the defendants that the burden is on the plaintiff to prove that the lorry fell outside the First Sch to the Act and that the agreement is outside the Act, adding that the doctrine of contra proferentem applied in favour of the defendants as hirers, in that any ambiguity or confusion over the weight of the lorry should be resolved in G favour of the defendants.

DECISION OF THE COURT

*Authorities cited for defendants*

H Before I proceed to consider the question relating to burden of proof, I shall consider the authorities cited for the defendants.

In *MBf Finance Bhd v Alluwi*, the crux of the case concerns an application for enlargement of time to lodge a notice of appeal against the decision of the sessions court made in respect of an excavator which does I not come within the list of goods in the First Sch to the Act. In the course of dealing with the merits of the appeal as a factor favouring the application, Jeffrey Tan J observed that 'it does not mean, whenever the subject matter

is not specified in the First Sch, that parties can never contract under the Act', and that the intitulement of the agreement in that case referred to a hire purchase agreement, in which the formation and contents of the agreement were all in conformity with all the requirements of the Act, as a result of which his Lordship said that it was more than arguable that the agreement was a hire purchase agreement designed for use in respect of the goods specified in the First Sch, but adopted and agreed by the parties to be used in respect of the purchase of the excavator, thereby concluding that there were merits in the appeal. A B

In my view, these observations made in the hearing of an application for enlargement of time to file a notice of appeal in which the applicant said nothing about the merits of the appeal (see p 504) are actually obiter dictum which does not have any binding effect, as opposed to ratio decidendi. These observations would certainly have become ratio decidendi if they had been made in the course of hearing the appeal proper in which parties have ventilated their views thereon. In the circumstances, I am of the view that the decision is of little or no assistance to the defendants. C D

Quite apart from that, s 4C of the Act prescribes the contents of a hire purchase agreement under the Act, but a proper perusal of the agreement tendered before the learned magistrate shows that the agreement did not follow the contents of s 4C(c)(iii)–(v) as these items pertaining to the amounts included in the freights, vehicle registration fees and insurance were not specified in the agreement. In the circumstances, it is clear that the parties hereto have agreed not to be bound by the provisions of the Act. E

*Kesang Leasing*, which was followed by Jeffrey Tan J in *MBf Finance Bhd v Alluwi*, concerned a hire purchase agreement for the hire of a unit of personal computer which at that time did not fall under the First Sch to the Act. The plaintiff's action against the defendant brought under the Act was dismissed by the learned magistrate on the ground that the Act did not apply. In allowing the appeal, Eusoff Chin J (later Chief Justice) held that the object and purpose of the Act are to regulate the form and contents of hire purchase agreements and the rights and duties of the parties thereto, and that s 1(2) of the Act does not exclude the application of the provisions of the Act to hire purchase agreements in respect of goods not specified in the First Sch if the parties have agreed to be bound by the provisions of the Act. F G

In my view, the facts in *Kesang Leasing* may be described as the reverse of the facts in this appeal, in that the action there was brought under the Act, while this action under appeal here was not brought under the Act. The essential issue in that case was that the parties have agreed to be bound by the provisions of the Act, while in this appeal, the defendants argued in favour of being bound by the provisions of the Act while the plaintiff contended that it was outside and not subject to the Act. Hence *Kesang Leasing* may be distinguished accordingly as the parties do not appear to have agreed by way of consensus ad idem to be bound by the provisions of the Act. H I

A Section 2(1) of the Act applies to agreements within its ambit but does not prohibit hire purchase agreements outside its ambit: *Arab Malaysian Credit Bhd v Har Yoke Ling* [1998] MLJU 2, cited in *MBf Finance Bhd v Alluwi. Arab Malaysian Credit Bhd* did not decide that an agreement outside the Act is also mandatorily governed by the Act.

B *Burden of proof*

I shall now consider the crucial issue which arises in this appeal relating to the burden of proof.

On the basis of the plaintiff's amended pleading, the plaintiff's action is C obviously not grounded on the provisions of the Act but instead based on common law principles. On this premise, and from SP1's evidence, the learned magistrate found that the plaintiff has adduced evidence that the lorry was a heavy vehicle which, the plaintiff submitted, is not subject to the Act and so it was not necessary to send any notice under the Fourth and Fifth Schs.

D Section 101 of the Evidence Act 1950 provides for burden of proof in the following words:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
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> E (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The phrase 'burden of proof' has two distinct meanings, namely, the legal burden of establishing a case and the evidential burden of introducing evidence. Section 101 deals with the former while s 102 of the same Act F deals with the latter: see p 704 *Evidence: Practice And Procedure* (2nd Ed, 2000) by Augustine Paul J. Section 102 of the same Act reads:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

G Applying ss 101 and 102 of the Evidence Act 1950, the legal burden of proof is on the plaintiff to establish that the lorry is not subject to the Act. The plaintiff sought to do this by adducing evidence that it is a lorry and a heavy vehicle and that it was not subject to the Act. There is therefore prima facie evidence that the lorry is a heavy vehicle not subject to the Act, but the defendants' counsel made no attempt whatsoever to cross-examine, H although it has been pleaded by the defendants that the lorry and the agreement were subject to the Act.

In my view, the legal burden of proof on the plaintiff under s 101 has prima facie been discharged on a balance of probabilities in this civil case in which event the evidential burden shifts to the other party, ie the I defendants: *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 at p 706; *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75;

*Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 and *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86.

The defendants can discharge the evidential burden by cross-examination of witnesses of the plaintiff, ie the party on whom the legal burden of proof lies or by calling witnesses or by giving evidence themselves or by a combination of the different methods. 'If he does not adduce any evidence when the [evidential] burden has shifted to him, he will fail' (per Augustine Paul JC (now J) in *Tan Kim Khuan* at p 706).

In view of the fact that the defendants did not cross-examine SP1 on the evidence that the lorry as a heavy vehicle was not subject to the Act, and elected not to call witnesses or give evidence themselves, the defendants cannot be heard to raise this issue in argument. The importance of putting the defendants' case to his opponent's witness or witnesses has been explained in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 by the Court of Appeal when applying the rule in *Browne v Dunn* (1893) 6 R 67, as follows (at p 794):

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

(See also *Sivalingam Periasamy v Periasamy & Anor* [1996] 4 CLJ 545 at p 551 (also at [1995] 3 MLJ 395) and *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 CLJ 526 at p 533 (also at [2001] 1 MLJ 268)).

Further, illustration (b) in s 102 of the Evidence Act 1950 clearly casts the evidential burden of proof on the defendants. It reads as follows:

> (b) A sues B for money due on a bond.
>
> The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.
>
> If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.
>
> Therefore the burden of proof is on B.

In the hearing before the learned magistrate, and now the appeal before me, the plaintiff (A) is suing on the agreement, the execution of which was admitted by the defendants (B), but the defendants (B) said that it was subject to the Act, which (A) denied. In the above illustration, even if no evidence is given on either side, the plaintiff (A) would succeed as the agreement was not disputed. A fortiori, in this appeal, there was evidence that the lorry was a heavy vehicle not subject to the Act. The defendants to whom the evidential burden of proof has been shifted must introduce evidence that the heavy vehicle was subject to the Act, but the defendants have failed to do so.

In *TA Securities Sdn Bhd v Lim Tee Keong* [2001] MLJU 481, the plaintiff gave evidence pertaining to the defendant's opening of trading and margin accounts with the plaintiff for the purpose of buying and selling securities on the Kuala Lumpur Stock Exchange. PW2 was the remisier for the defendant. The plaintiff's claim against the defendant was based on the fact that the defendant had given instructions on the telephone to PW2 to purchase certain shares and that the defendant had failed to pay the purchase price for the shares. As a result thereof, the plaintiff had to force sell the shares and the losses suffered by the plaintiff was a sum of RM9.1m. The defendant denied giving any instructions to PW2 to purchase the shares and the parties agreed that the only issue for determination was whether or not the defendant had in fact placed an order for the shares through PW2. The defendant elected to give no evidence at all. Rekhraj J (as he then was) held that in such a case the court was deprived of hearing the defendant on his version of the story and of weighing the balance of probabilities. The plaintiff's evidence therefore remained unrebutted and judgment was given in favour of the plaintiff.

Similarly, in this appeal, the plaintiff's case also remained unrebutted as the defendants have failed to discharge the evidential burden of proof.

Most importantly, just before I delivered this judgment in this appeal, learned counsel Ms Leong for the plaintiff and Mr Yong for the defendants have agreed that in the light of the registration card showing the maximum permissible laden weight of the said vehicle to be 4100kg and therefore exceeding 2540kg for a goods vehicle listed in para 2(d) of the First Sch to the Act, the lorry in this appeal is clearly outside the ambit of the Act, in which case, the plaintiff was correct in saying that the Act does not apply to the agreement. In fairness to the learned magistrate, this critically decisive fact has not been agreed by the different set of learned counsel who appeared before the learned magistrate and had it been so agreed in the court below, I have absolutely no doubt whatsoever that her decision would have been different.

*Contra proferentem*

This basic rule of construction means that where an ambiguity or doubt arises in the interpretation of a written document such as an agreement, that ambiguity or doubt would be resolved by construing the agreement against the person who drafted, prepared or put forward the agreement: (see eg *Edis v Bury* 108 ER 511; *Tiun Eng Jin v Wong Sie Kong* [1975] 2 MLJ 34 at p 38).

In this appeal, I am unable to identify the part of the agreement which has suffered from an ambiguity or a doubt. One must not attribute an ambiguity or doubt to an agreement when in reality there was none. I do not find any force or merit in this submission and see no reason in upholding it.

## Conclusion

On the foregoing grounds, I therefore allow this appeal, set aside the aforesaid order of the learned magistrate and give judgment in favour of the

plaintiff in terms as prayed in the amended claim, with costs here and the court below. A

*Appeal allowed, order of the learned magistrate set aside and judgment given in favour of the plaintiff in the terms as prayed in the amended claim, with costs.*

Reported by Chew Phye Ken B

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